No. 01-1444

Supreme Court, U.S.
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In The

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant this petition for certiorari where Petitioner's argument depends upon the interpretation of facts that were rejected by the District Court and the Ninth Circuit.

2. Whether this Court should review the decision of the Court below to decide whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights, where the facts in the case established that the defendant officer engaged in coercive questioning of the plaintiff that violated his rights irrespective of whether he had received the Miranda warnings.

3. Whether this Court should review the decision of the Court below to decide whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights, where the plaintiff in any event asserted his right to decline to answer questions and the defendant officer intentionally violated his rights by questioning him notwithstanding respondent's assertion of his right to remain silent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CONSTITUTIONAL PROVISIONS MISSTATED OR OMITTED BY THE PETITIONER 1

STATEMENT OF THE CASE AND PROCEDURAL STATUS 1

REASONS FOR DENYING THE WRIT 3

I. THE FACTS ARGUED IN THE PETITION ARE INCORRECT, ARE NOT SUPPORTED BY THE RECORD AND HAVE BEEN REJECTED BY THE DISTRICT COURT AND THE NINTH CIRCUIT 3

A. The Length of Time of The Interrogation 3

B. Martinez's Assertion of His Fifth Amendment Right to Remain Silent 4

1. Respondent Martinez Twice Asked Not to Be Interrogated 4

2. Petitioner's Declaration Conflicts with His Tape Recording of The Interrogation 5

C. Martinez's Condition at The Time of The Interrogation 6

II. THE ACTIONS OF THE PETITIONER VIOLATED THE CONSTITUTIONAL RIGHTS OF THE RESPONDENT TO REMAIN SILENT AND CONSTITUTED THE UNCONSTITUTIONAL COERCION OF STATEMENTS FROM HIM 7

TABLE OF CONTENTS – Continued

Page

A. Early Cases Rejected The Contention That The Fifth Amendment Is Violated Only If and When the Statement Is Introduced in a Criminal Trial 9

B. Recent Cases Also Reject The Contention That the Fifth Amendment Is Violated Only If and When The Statement Is Introduced in a Criminal Trial 10

C. The Two Facets of The Fifth Amendment Extend its Protections Beyond Introduction of a Coerced Statement in a Criminal 12

III. THE PETITIONER MISSTATES THAT *MARTINEZ v. CITY OF OXNARD* CONFLICTS WITH A DECISION OF THIS COURT AND OF A CIRCUIT COURT 14

A. The Facts and Holding of *Verdugo Urquidez* 15

B. The Facts and Law of *Mahoney v. Kersey* ... 17

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir.1999)..... 14

Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997)..... 14

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (*en banc*).....14, 18

Counselman v. Hitchcock, 142 U.S. 547 (1892)..... 9

Gardner v. Broderick, 392 U.S. 273 (1968)..... 11

Garner v. United States, 424 U.S. 648 (1976)..... 8

Garrity v. New Jersey, 385 U.S. 493 (1967).....11, 12

Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991)..... 14

Griffin v. Strong, 983 F.2d 1540 (10th Cir.1993)..... 14

Guerra v. Collins, 916 F. Supp. 620 (S.D. Tex.1995), *aff'd on other grounds*, 90 F.3d 1075 (5th Cir. 1996) 14

Lefkowitz v. Turley, 414 U.S. 70 (1973)..... 11

Mahoney v. Kersey, 976 F.2d 1054 (7th Cir. 1992).....15, 17, 18

McCarthy v. Arndstein, 266 U.S. 34 (1924)..... 11

Mincey v. Arizona, 437 U.S. 385 (1974)..... 6

Minnesota v. Murphy, 465 U.S. 420 (1984).....8, 13

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).....8, 12

United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (per curiam), *cert. denied*, 114 L. Ed. 2d 477, 111 S. Ct. 2235 (1991)..... 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Verdugo Urquidez, 494 U.S. 259 1990)..... 14, 15, 16, 17

Weaver v. Brennan, 40 F.3d 527 (2nd Cir.1994)..... 14

Wilson v. City of Chicago, 707 F. Supp. 379 (N.D. Ill. 1991)..... 14

STATUTES AND RULES

42 U.S.C. § 1983.....1, 14, 15, 17, 18

Supreme Court Rule 10(a) 15

Supreme Court Rule 10(b) 15

Supreme Court Rule 10(c) 15

Supreme Court Rule 15.2 .....1, 3

CONSTITUTIONAL PROVISIONS MISSTATED OR OMITTED BY THE PETITIONER

In accord with Supreme Court Rule 15.2, Respondent sets forth the omission by the Petitioner of the due process clause of the Fourteenth Amendment. This provisions of law bears on issues that should be considered, if properly before this court, should certiorari were granted:

> 1. No state . . . shall be deprived any person of life, liberty, or property, without due process of law. . . .

U.S. Const., amendment XIV.

STATEMENT OF THE CASE AND PROCEDURAL STATUS

Plaintiff, Oliverio Martinez, age 32 years, is a long-time resident of Oxnard, Ventura, California. Plaintiff filed a complaint under 42 U.S.C. § 1983 alleging that on November 28, 1997, the individual officers violated his constitutional rights by stopping him without probable cause, using excessive force during the arrest, interrogating him in violation of constitutional standards and denial of medical care. The undisputed facts summarized below are set forth in more detail by the District Court's Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment. Pet. App. 15a-23a.

On June 5, 2000, Plaintiff moved for summary adjudication *inter alia* that: (1) that the questioning of Respondent by Petitioner violated Martinez's Fifth and Fourteenth Amendment rights; (2) that the statements of

Martinez in response to the interrogation by Petitioner were untrustworthy as Martinez was not mentally competent to make a voluntary statement under the Fourteenth Amendment.[1]

On August 1, 2000, the District court granted summary adjudication of Plaintiff's claims finding that (1) the questioning violated the Plaintiff's Fifth and Fourteenth Amendment rights; (2) that the statements were untrustworthy under the Fourteenth Amendment; and (3) denying CHAVEZ qualified immunity.

The Ninth Circuit opinion affirmed the denial of qualified immunity based on the uncontradicted facts above, concluding (in part) that "a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments." Pet. App. 14a

CHAVEZ'S Petition for Rehearing and Suggestion for Rehearing En Banc was denied after the full court had been advised "and no active judge has requested a vote on whether to hear the matter en banc." Pet. App. 32a. This Writ of Certiorari was docketed on April 3, 2002, and Respondent now files this Opposition.

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[1] A Fourth Amendment claim for arrest without probable cause and an Eighth and Fourteenth Amendment claim for denial of medical attention were also considered and denied.

REASONS FOR DENYING THE WRIT

I. THE FACTS ARGUED IN THE PETITION ARE INCORRECT, ARE NOT SUPPORTED BY THE RECORD AND HAVE BEEN REJECTED BY THE DISTRICT COURT AND THE NINTH CIRCUIT

In accord with Supreme Court Rule 15.2, Respondent sets forth the misstatements of fact proffered by the Petitioner.

A. The Length of Time of The Interrogation

CHAVEZ'S version of facts that "the interview was only 10 minutes and 7 seconds" (Pet. 3 and 7) was rejected by the District Court:

> Defendants argue that a reasonable officer might have thought a "ten-minute, seven-second examination" did not violate the Constitution. Although plaintiff's answers to Chavez's questions may be produced only ten minutes of tape recording, **it is undisputed that the interview was conducted intermittently for approximately 45 minutes.** (McCormick Dec., Ex. F., Chavez Dec., 126:12-13.)[2] In light of the fact that

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[2] In finding this evidence undisputed the district court relied upon the declarations of the Petitioner and his lawyer. "McCormick" is Kevin McCormick, who, at the time, was co-counsel with Alan E. Wisotsky of the Law Office of Alan E. Wisotsky, the Petitioner's attorney. "Chavez" is the Petitioner. At page 271:12-20, of the Record on Appeal, CHAVEZ declared: "I determined that I was with Mr. Martinez in the emergency room for approximately 45 minutes. . . . I was present with Mr. Martinez between the time he arrived at the hospital and the CT study being performed."

> plaintiff was suffering excruciating pain and being prepared for emergency surgery, forty-five minutes is an excessively lengthy interview. The fact that Chavez returned to continue questioning plaintiff after being repeatedly ushered out of the room by medical personnel exacerbates the coercive nature of the interview. Pet. App. 27a, emphasis added.

Thus, this version of the facts now urged by CHAVEZ in his petition are opposite to the facts CHAVEZ and his counsel offered in opposition to plaintiff's motion for summary judgment and this Court should reject these newly proffered "facts."

Contrary to the Petitioner's assertion, the Circuit opinion also found that the interview lasted 45 minutes:

> As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting Miranda warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Pet. App. 4a.

B. Martinez's Assertion of His Fifth Amendment Right to Remain Silent

1. Respondent Martinez Twice Asked Not to Be Interrogated

CHAVEZ misleads the court to believe that Martinez failed to assert his right to remain silent by arguing that Martinez's failure to "ask for a lawyer," is a waiver of his Fifth Amendment rights. Pet. 12-13. The District Court

rejected this version of the facts because asking for a lawyer is not the only method of invoking the right to remain silent.

> Defendants argue that plaintiff never told Chavez to leave or requested to be left alone. However, on several occasions plaintiff told Chavez "I am not telling you anything until they treat me, and I don't want to say anything more." (Mercado Dec., Ex. 2, p. 6, 11.) These statements clearly communicate plaintiff's "intent not to speak." Plaintiff's requests, made among many other pleas for treatment, are sufficient to put a reasonable officer on notice that plaintiff was not speaking voluntarily. Pet. App. 27a.

2. Petitioner's Declaration Conflicts with His Tape Recording of The Interrogation

In rejecting CHAVEZ's proffered evidence, the district court pointed out (Pet. App. 21a, fn. 1) that Petitioner's declaration submitted in support of qualified immunity conflicted with Petitioner's tape recorded interview on the issue that MARTINEZ had twice told CHAVEZ that he did not want to talk but that CHAVEZ persevered.

> The Declaration of Officer Chavez, submitted in Opposition to this Motion, contains the following statement concerning the interview at the hospital. "**He never refused to respond to my questions** until the end of the interview, at which time I stopped the interview." (McCormick Dec., Ex. F ¶8.) The transcript of the interview reflects that **on two occasions during the**

> **interview, plaintiff told the officer he did not want to say anything further, but the questioning continued**. (McCormick Dec., Ex. I, at 6, 11.) The Declaration does not create a triable issue of fact. Pet. App. 21a, fn 1, emphasis added.

C. Martinez's Condition at The Time of The Interrogation

The District Court and the Ninth Circuit found the facts in *Mincey v. Arizona*, 437 U.S. 385 (1974), analogous to this matter. In attempting to distinguish the facts of *Mincey*, Petitioner argues facts that were never supported by the record: "In contrast, **the respondent was lucid throughout the interview and never expressed any hallucinations or statements indicating that he was confused or unable to think clearly**; his responses made sense." Pet. 16., emphasis added.

The District Court rejected those facts and found the facts to be quite different:

> However, the totality of the circumstances in this case convinces the Court that plaintiff's statements was (sic) not voluntarily given. He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details for the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk. Pet. App. 22a.

In rejecting Petitioner's twist of the facts, the Ninth Circuit found the condition of the Respondent based on

CHAVEZ'S taped interview and his deposition testimony be as follows:

> Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "during the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more."

In summary, CHAVEZ requests this Court to review and find erroneous the factual determinations below. This Court should not decide to review the undisputed facts upon which summary judgment was granted and qualified immunity denied.

II. THE ACTIONS OF THE PETITIONER VIOLATED THE CONSTITUTIONAL RIGHTS OF THE RESPONDENT TO REMAIN SILENT AND CONSTITUTED THE UNCONSTITUTIONAL COERCION OF STATEMENTS FROM HIM

Petitioner essentially argues that this is only a Fifth Amendment case based on the failure to give *Miranda* admonitions. This argument disingenuously misstates the central issue of the holdings below that CHAVEZ'S coercive conduct and effort to have Martinez incriminate himself is a core violation of the Fifth and Fourteenth

Amendments and contrary to the very policies the privilege against self-incrimination was designed to protect.[3]

This Court has held that compelling a person to speak and to make statements against himself after he has asserted his right not to speak violates his constitutional rights under the Fifth and Fourteenth Amendments, whether or not he has received Miranda warnings and whether or not his statements are subsequently used against him in a criminal trial. The Court has made clear that the government may not assess a penalty against a person for asserting his Fifth Amendment right not to answer questions. Imposition of such a penalty "foreclos[es] a free choice to remain silent, and . . . compe[ls] . . . incriminating testimony." *Garner v. United States*, 424 U.S. 648, 661 (1976). Hence, in *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) the Court has held that the government may not constitutionally impose such penalties:

> In each of the so-called 'penalty' cases, the state not only compelled an individual to appear and testify, but also sought to induce him to forego the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the

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[3] See *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964): (" . . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . our respect for the inviolability of the human personality. . . . ") *Id.*, cites omitted

> Amendment forbids.' Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977). In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the Court ruled that the state could not constitutionally make good on its prior threat. Lefkowitz v. Turley, 414 U.S., at 79-84; Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280, 283-284 (1968); Gardner v. Broderick, 392 U.S. 273, 278-279 (1968). These cases make clear that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself. Lefkowitz v. Cunningham, supra, 431 U.S. at 805.

A. Early Cases Rejected The Contention That The Fifth Amendment Is Violated Only If and When The Statement Is Introduced in a Criminal Trial

There are many situations in which the Fifth Amendment may properly be asserted and in which coercing a person to talk over his invocation of the privilege would violate the Fifth Amendment at the time of the coercion. For example, if a witness asserts the privilege against self-incrimination at a grand jury proceeding, he may not be compelled to answer questions which might incriminate him unless he is afforded immunity. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court held that the right prohibiting compelled statements was not limited to criminal trials:

> It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case

against himself; but such is not the language of the constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. . . . It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. *Id.*, 562.

This broader interpretation of the reach of the Fifth Amendment has been consistently upheld.[4]

B. Recent Cases Also Reject The Contention That The Fifth Amendment Is Violated Only If and When The Statement Is Introduced in a Criminal Trial

More recently the Court held unconstitutional a state statute which would have compelled architects to testify

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[4] See, e.g., *United States v. North*, 287 U.S. App. D.C. 146, 920 F.2d 940, 948 (D.C. Cir. 1990) (per curiam) ("We believe – as do five of our sister circuits . . . – that grand jury consideration of evidence already unconstitutionally compelled . . . such as where Miranda warnings are not given, the constitutional violation occurs independent of the grand jury."), *cert. denied*, 114 L. Ed. 2d 477, 111 S. Ct. 2235 (1991).

despite an assertion of Fifth Amendment rights, by denying them government contracts unless they waived any claim of immunity from prosecution based upon their answers. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Similarly, this Court has held that a bankrupt petitioner may not be held in contempt and imprisoned for failing to file a schedule of his assets, where he has asserted his Fifth Amendment privilege in declining to file on the ground that the information could incriminate him. *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (affirming release from custody on writ of habeas corpus). The Court explained:

> The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. 266 U.S. at 42.

In the context of an administratively compelled statement involving, e.g., police officers, the violation of the Fifth Amendment occurs if the officer is forced to give a statement at the threat of losing his/her job when the same statement can also be used for criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Gardner v. Broderick*, 392 U.S. 273 (1968)

These cases and others make clear that the narrow reading of the Fifth Amendment urged by the Petitioner

is without support. It is clear that a witness in a civil deposition could not be compelled by a court order to answer questions despite an assertion of the Fifth Amendment privilege. Equally so, a witness who is compelled to testify before a congressional, senatorial or other legislative investigative body may not be forced to testify over the invocation of Fifth Amendment's protections.[5]

C. The Two Facets of the Fifth Amendment Extends its Protections Beyond Introduction of a Coerced Statement in a Criminal Case

As demonstrated above, the Fifth Amendment privilege against compulsory self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. To fulfill its purposes the constitutional privilege against self-incrimination has two primary interrelated facets: (1) the Government may not use compulsion to elicit self-incriminating statements; and, (2) the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 57 fn. 6 (1964).

The argument advanced by the Petitioner ignores the first facet – the prohibition against compulsion – by limiting the scope of the constitutional right to the second

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[5] (See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967) (upholding invocation of privilege in state investigation) and *Murphy v. Waterfront Commission of New York Harbor, supra* (upholding privilege in hearings before a federally approved bi-state regulatory body.)

facet – the exclusionary rule and the use of a compelled statement in a criminal trial. This faulty argument implies that egregious and blatant violations of the privilege against self-incrimination by coercive tactics or interrogations could never be actionable as a violation of due process "unless and only" if it was introduced into a criminal trial.

Not only is this not the law, such a rule would invite intentional and malicious violations if an unscrupulous interrogator knew that coercion was not actionable because the statements would never result in a criminal prosecution, or if it did, the interrogation and coerced responses would not be introduced.

In the case of a person in police custody, this Court has recognized that there is coercion inherent in the custodial situation. As this Court has noted, "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. at 433.

In the present case, of course, the officer did not merely insinuate that interrogation would continue until a confession was obtained, he in fact continued to interrogate, despite respondent's expressed assertion of his right not to answer questions and his perilous medical condition. That this violated his Fifth and Fourteenth Amendment rights under the cases cited above may not seriously be questioned.

There are a number of other circuit civil cases holding that coercing statements constitutes a constitutional violation at the time of the coercive conduct, whether or

not such statements are subsequently introduced into evidence at a criminal trial.[6]

III. THE PETITIONER MISSTATES THAT *MARTINEZ V. CITY OF OXNARD* CONFLICTS WITH A DECISION OF THIS COURT AND OF A CIRCUIT COURT.

Petitioner asserts as a basis for seeking certiorari that the **holdings** of *United States v. Verdugo Urquidez*, 494 U.S.

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[6] *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (holding force used in an attempt to coerce an incriminating statement stated a § 1983 claim for violations of the Fifth and Fourteenth Amendments); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992) (*en banc*) ("It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's wrongdoing was complete at the moment it forced Cooper to speak."); *Griffin v. Strong*, 983 F.2d 1540 (10th Cir. 1993) (upholding a § 1983 action based on a coerced confession was presented by the facts as a matter of law); *Weaver v. Brennan*, 40 F.3d 527 (2nd Cir. 1994) (coerced statement creates a claim under § 1983 although not introduced into criminal trial.); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) (upholding § 1983 claim and denying qualified immunity for defendant who coerced a witness and used coerced statement in warrant to arrest plaintiff although statement never introduced into criminal case.) *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (intentional questioning after invocation of 5th Amendment rights constitutes a claim under § 1983 although statements not introduced into criminal trial.) *Guerra v. Collins*, 916 F. Supp. 620, 626-627 (S.D. Tex.1995), *aff'd on other grounds*, 90 F.3d 1075 (5th Cir. 1996) (holding intimidation of youthful witnesses who spoke poor English leading to false damaging statements violated due process); *Wilson v. City of Chicago*, 707 F. Supp. 379 (N.D. Ill. 1991) (coerced confession actionable even if state criminal proceeding results in an exclusion of the statements).

259 (1990) and *Mahoney v. Kersey*, 976 F.2d 1054 (7th Cir. 1992) conflict with the circuit's decision below. Petitioner misstates the holdings of both cases and fails to establish any of the reasons for granting the writ set forth in Supreme Court Rule 10(a), (b) or (c)

Neither case conflicts with *Martinez*. In summary, the holding in *Verdugo Urquidez* was that the Fourth Amendment did not extend to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The holding in *Mahoney v. Kersey* was that there was no qualified immunity for a false arrest and that the defendant waived objections to plaintiff's theory that malicious prosecution constitutes a constitutional violation for § 1983.

Neither case is based on a coerced statement nor the Fifth Amendment, nor the Fifth and Fourteenth Amendments. In both cases the comments cited by Petitioner are dicta and not the holding of the case.

A. Facts and Holding of *Verdugo Urquidez*

In *Verdugo Urquidez* the Government obtained an arrest warrant for Verdugo Urquidez – a Mexican citizen and resident believed to be a leader of an organization that smuggles narcotics into this country – he was apprehended by Mexican police and transported to the U.S. where he was arrested by federal police. Following his arrest, Drug Enforcement Administration (DEA) agents, working in cooperation with Mexican officials, without a warrant, searched his Mexican residences and seized certain documents. The District Court granted the criminal

defendant's motion to suppress the evidence. The Court of Appeals affirmed. The Supreme Court defined the issue to be decided was "The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." (*Id.*, 261.)

The holding of that case was limited solely to the facts of the search in Mexico, the Fourth Amendment and the rights of aliens. It was stated as follows:

> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. (*Id.*, 274-275.)

The Court in *Verdugo* discussed excluding the possibility that the defendant's Fourth Amendment rights were violated not only by an illegal search, but also by introduction of the evidence at trial. The Court concluded that the exclusionary rule, which bars illegal seized evidence from trial, is "a remedial question separate from the existence vel non of the constitutional violation." 494 U.S. at 264. Thus the Court concluded, "if there were a constitutional violation, it occurred solely in Mexico." *Id.*

The Court, for the sake of illustration, contrasted the Fourth Amendment with the Fifth Amendment, where there is clearly a violation at trial if a coerced statement is

introduced in evidence. The Court had no occasion to consider, even for the purpose of the comparison it was making, whether a Fifth Amendment violation can occur prior to trial. Although the Court did state that the Fifth Amendment right " . . . is a right which is properly asserted only during trial and only by defendants in a criminal proceeding," (*id.*) that was clearly dicta and essential neither to the holding of the case, nor to the comparison with Fourth Amendment rights.[7]

B. The Facts and Law of *Mahoney v. Kersey*

In *Mahoney v. Kersey, supra*, a jury awarded Plaintiff Mahoney, a college student, $20,000 in his suit under 42 U.S.C. § 1983 against Kersey a Milwaukee police officer for false arrest and malicious prosecution. At the trial there was no allegation of a coerced statement and no allegation that the Fifth Amendment and Fourteenth Amendment was violated by a coerced statement.

The quote Petitioner relies upon was made in the context of a tangential discussion on the issue of whether the defendant had waived objection to plaintiff's argument that malicious prosecution was a violation of the due process clause and whether malicious prosecution was a "constitutional tort," actionable as a claim under § 1983. In that discussion the *Mahoney* court discussed

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[7] "Dicta" is defined as: "(1) Opinions of a judge which do not embody the resolution or determinations of the court. (2) Expressions in a court's opinion which go beyond the facts before the court and are therefore individual views of the author of the opinion and not binding in subsequent cases." Black's Law Dictionary, West Pub., 5th Ed. p. 408.

Mahoney's argument to the jury that his right not to incriminate himself was infringed by the filing of criminal charges against him after he was questioned by the defendant officer.

The court noted that it had previously indicated that "the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case – otherwise, immunity statutes would be unconstitutional." (*Id.*, 1061-1062, cites omitted.) The court noted that there is an argument that coercion itself does violate constitutional rights, citing the Ninth Circuit's decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992). The court explicitly declined to reach the question of whether it would adopt the *Cooper* analysis, because it held that the officer had waived his objection to the point at issue. 976 F.2d at 1062. The Seventh Circuit decision does not constitute authority on this issue one way or the other and therefore cannot conflict with the holding in *Martinez*.

IV. CONCLUSION

This Court should not grant this petition for certiorari as the Petitioner's argument depends upon the assertion of facts that were rejected by the District Court and the Ninth Circuit.

The Court should not review the decision of the Court below based on Petitioner's assertion that the issue is whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights. The case below established that the Petitioner engaged in coercive questioning after the Respondent asserted his

right to decline to answer questions and that the Petitioner intentionally violated his rights by questioning him notwithstanding his assertion of his right to remain silent and his debilitating mental and physical state of disability. That conduct violated respondent's rights irrespective of whether he had received the *Miranda* warnings and the issue urged by the Petitioner was not the holding below.

Respondent respectfully requests the petition be denied.

Respectfully submitted,

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